1968

# Don Layton, aka Donald W. Layton, and Helen D. Layton, His Wife v. Gordon E. Holt and S. John Webber; Salt Lake County, A Body Politic of The State of Utah; Marvin Jenson Commissioner : Brief of Respondents

# IN THE SUPREME COURT OF THE STATE OF UTAH

DON LAYTON, aka Donald W. Layton, and HELEN D. LAYTON, his wife,
*Plaintiffs and Appellants,*

vs.

GORDON E. HOLT and S. JOHN WEBBER; SALT LAKE COUNTY, a body politic of the State of Utah; MARVIN JENSON, Commissioner,
*Defendants and Respondents.*

Case No. 11298

## BRIEF OF RESPONDENTS

**Appeal from Judgment of the Third District Court**
**For Salt Lake County**
**Hon. D. Frank Wilkins, Judge**


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## CASES CITED



## STATUTES

### UTAH CODE ANNOTATED 1953

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### STATEMENT OF FACTS

Contrary to appellants' representation that they own the fee title to Lot 8, Block 1 North, Beyles Riverside Plot, they own fee title to an undivided one-half interest only.

The Warranty Deed at p. 78 of the Abstract to the property (Ex. P. 5) dated Sept. 15, 1930, conveys

Lot 8 to A. V. and Patricia G. Raplee as tenants in common. The affidavit of Patricia G. Raplee at R. 35 discloses that A. V. Raplee is deceased. There is no evidence whether he left a will or who his heirs are. Appellants' claim to title to Lot 8 consists of a deed they acquired for $50.00 from Patricia G. Raplee dated May 3, 1965, recorded May 6, 1965 (Ex. P-3) and a deed they acquired for $50.00 dated May 10, 1965, recorded May 12, 1965 (Ex. P-4) from Robert G. Raplee, who describes himself as the only child of Patricia G. Raplee and the late A. V. Raplee. The record is also silent as to how many times A. V. Raplee was married or what children he may have had from other wives. Appellants failed to prove that they acquired the undivided one-half interest of A. V. Raplee to Lot 8 as a tenant in common.

Respondents claim ownership thru Ex. D-1, Auditor's Tax Deed, dated Feb. 28, 1939, conveying Lot 8 to Salt Lake County upon failure of owners to redeem Lot 8 for four years after the tax sale made Jan. 10, 1935 for unpaid 1934 taxes, together with Ex. D-2, Salt Lake County Deed to respondents dated June 15, 1965, of Lot 8, for $400.00 tendered to Salt Lake County on April 28, 1965, (T-107 and Ex. D-10) with respondents' offer to purchase Lot 8 from the County.

Mrs. Raplee's affidavit dated June 2, 1966 (R-35) was received in evidence per Stipulation of the parties shown at R. 45. Mrs. Raplee's affidavit states:

"3. That neither my deceased husband during his life, nor I during my lifetime, or anyone acting for us or on our behalf, ever went upon the aforesaid real property (Lot 8) or took possession or occupancy of it from and after the time we purchased it from W. R. Roberts and Lulu Roberts, his wife, on Sept. 15, 1930.

4. Neither of us . . . paid any of the taxes . . . except for the first few years. So far as my deceased husband and I were concerned, we abandoned the property more than 30 years ago."

On May 12, 1965, after appellants had recorded the last of the two deeds received from Mrs. Raplee and her son, and until they filed this action on June 1, 1965, appellants went to Lot 8, looked at it and measured it with a tape. They went back to the property a second time to see if there were any trucks parked on it. (T-71, 72). Mr. Layton testified (T. 92) that appellant claimed no right or interest in Lot 8 prior to May 12, 1965. Thereafter and up to the time of the filing of this action, Mr. Layton admitted he didn't occupy the land. We quote from T-93:

Q. And other than what you did the first time you went down, you did nothing between May 12, '65 and June 1, '65, except file your suit in this matter. Would that be a correct statement of fact?

A. As far as occupying the land?

Q. Yes.

A. No, I didn't occupy the land.

The court found that the appellants and their predecessors failed to actually occupy or be in possession of the property for more than 30 years last past, which 30 years encompasses the four years prior to the commencement of their action, and appellants were therefore found barred under the provisions of Sections 78-12-5.1, 78-12-5.2, 78-12-5.3 and 78-12-7.1, UCA 1953 as amended (R. 52, 53).

## STATEMENT OF POINTS

1. Appellants' action is barred by the statute of limitations, 78-12-5.1 and 78-12-5.2.

2. Appellants' action is barred by the adverse possession statute 78-12-7.1.

3. Respondents have proved title and are entitled to the decree which quieted their title against appellants.

## ARGUMENT

### RESPONDENTS HAVE A TAX TITLE VALID AGAINST APPELLANTS' TITLE.

Salt Lake County acquired a tax title by Auditor's Tax Deed dated Feb. 28, 1939 (D-1) and respondents succeeded to it by Salt Lake County Deed dated June 15, 1965, (D-2) pursuant to a $400.00 tender and offer to purchase submitted to Salt Lake County April 28, 1965, (T-107), which offer was accepted at the Salt Lake County Commission meeting June 4, 1965. (T-108). Appellants owned Lots 1 thru 6. Respondents

outbid them and acquired Lot 7 in early April, 1965 at a probate sale, offered to purchase Lot 8 from the County on April 28, 1965, and acquired Lot 9 from dealings with a private party which culminated on May 11, 1965. Respondents, after acquiring Lot 7 and prior to May 1, 1965, had Lots 7, 8 and 9 surveyed and marker pegs installed prior to June 1, 1965, (T-111), which pegs were visible to appellants when they went upon the property after May 12, 1965 (T-73). Respondents contend appellants had not advised them of their interest in or purchase of Lot 8 at any time prior to respondents' purchase of it on June 4, 1965, or they wouldn't have thrown away their $400.00 (T-112, 113, 114, 115).

Appellants contend that the tax title is invalid in that the 1934 assessment roll contained no Auditor's Affidavit attached to it as required by Section 58-8-7 UCA 1953. However, Section 78-12-5.3 UCA 1953 defines "tax title" in such a way as to render immaterial the technical defects in tax sales that have heretofore voided the validity of tax titles, whereby respondents' tax title, even if invalid, is perfected if the owners are barred from maintaining an action against the tax title by virtue of the statutes of limitation, Sections 78-12-5.1 and 78-12-5.2, UCA 1953 as amended. So this Court decided in Hansen v. Morris, 3 Ut.2d 310, 283 P2 884.

Appellants cite Thomas v. Braffets Heirs, 6 Utah 2d 57, 305 P2 507, as authority that the missing Audi-

tor's Affidavit renders the instant tax title void. However, that case is not in point, as the Court there held that the defense of the owners of the land was not barred by the statutes of limitation aforesaid and the owners could therefore properly raise the invalidity of the tax title in their defense to it.

Introduction of the tax title, D-1, was sufficient under Section 78-12-5.3 UCA 1953 as amended to show prima facie valid tax title in respondents. See Hansen v. Morris supra.

Appellants cite Lyman v. Natl. Mtge. Bond Corp., 7 Utah 2d 123, 320 P2 322, that the tax title should fail even where the owners have not been in possession or occupancy. The court there held in favor of the owners because the tax owner had failed to pay all the taxes levied or assessed upon the property within four years prior to the commencent of the action. The Court held that the tax title owners had failed to establish any valid claim to the property because the adverse possession statute, 78-12-7.1 UCA 1953 barred them, under the last three lines thereof, because of their failure to pay all taxes on time for the required period of years therein set forth.

The instant case is not covered by the Lyman decision, for in this case, all taxes levied or assessed upon the property since the inception of the tax title in 1939 have been timely met. Further, respondents can prevail over appellants on the theory of adverse possessors, even if appellants were not barred by the statutes of

limitation, as respondents meet the remaining requirements of 78-12-7.1 to qualify as adverse possessors under a tax title. Appellants in their brief attempt to show that the Raplees had the constructive possession of the land because they were the legal owners and that the County did not become the owner in 1939 because of the alleged defect of the missing Auditor's affidavit on the assessment roll.

However, the presumption that the legal owner of the title is in possession of the land, cited in the general law and cases in pp. 15-18 of appellant's brief, is only a prima facie presumption. It falls in the face of the rebutting evidence presented by Mrs. Raplee's affidavit (R-35) in which she states that not only did they never take possession or go into any occupancy of the land — they had *abandoned* the property more than 30 years ago. Abandonment is inconsistent with possession or any constructive possession, and the presumption fails. Section 78-12-5.1 states that no action or defense shall be commenced or interposed more than four years after the date of the tax deed, conveyance or transfer creating such tax title unless the person commencing or interposing such action or defense or his predecessor has *actually occupied or been in possession* of such property within four years prior to the commencement of the action. Section 78-12-5.2 uses the language, " . . . has *actually occupied or been in actual possession*, . . ." When Mrs. Raplee states on May 3, 1965, that the legal owners abandoned the property

more than 30 years ago, or prior to May 3, 1935, how can appellants now contend that they, thru their (Raplee) predecessors, had constructive or any kind of possession? The prima facie presumption that the County, as legal owner since 1939 under the tax title, was in possession, remained unrebutted. The court found that appellants' acts between May 12 and June 1, 1965, did not constitute actually occupying or being in possession of the property. Furthermore, the dictum in Peterson v. Callister, 6 Ut. 2d 359, 313 P2d 814, indicates that appellants' efforts, even if successful, would have been a couple of decades too late.

The dictum in Peterson v. Callister, supra, anticipates, analyzes and capsules this case exactly as it was decided in the lower court, based on the court's interpretation of Sections 78-12-5.1 and 78-12-5.2, which are substantially similar and are our statutes of limitation concern tax titles.

78-12-5.1 says

> " . . . with respect to actions or defenses . . . against the holder of a tax title . . . *no* such action or defense shall be commenced or interposed more than four years after the date of the tax deed . . . unless the person commencing or interposing *such* action or defense . . . has actually occupied or been in possession . . . within four years prior to the commencement or interposition of *such* action or defense . . . " (Italics ours).

78-12-5.2 says:

> "*No* action or defense . . . shall be commenced

> or interposed against the holder of a tax title *after* the expiration of four years from the date of the . . . tax title. This section shall not bar any action or defense by the owner of the legal title . . . where he . . . has actually occupied . . . such property within four years from the commencement or interposition of *such* action or defense."

Both statutes interdict commencement of action or interposition of defense more than four years after the date of the tax title. Both statutes clearly state this. They then go on to identify who is permitted to commence such an action or interpose such a defense (during such four year period) as being a person who was in actual possession of the property within four years prior to *such* action or defense. Both statutes define and limit *such* action to an action (or defense) commenced or interposed within four years after the date of the tax title.

In other words, if the tax title arose Jan. 1, 1960, suit is required to be commenced or defense interposed, within four year thereafter, or prior to Jan. 1, 1964, and then only by a person who was in actual possession within four years prior to not later than Jan. 1, 1964, the last date on which such suit could commence or defense be interposed.

Peterson v. Callister, supra, clearly so states. It says that a person cannot defeat the tax title by showing that he was in possession within four years prior to the commencement of any action that might be brought, as appellants insist in the instant case. Appellants

wish this court to rely on the last half of the above two statutes and ignore the first half. The first half is a limitation on the last half of each statute and requires appellants to be in possession of the land within four years prior to the commencement of an action *which had to be commenced or defended within four years after the tax title arose.* The Court so held in Hansen v. Morris, supra.

As stated in Peterson v. Callister:

> "To read the last part of the statute literally and not in context with the entire statute would defeat the purpose of the statue, which is to put tax titles to rest after four years; that if a tax title holder brought a quiet title action 25 years after he acquired his tax title, someone in possession within four years of the commencement of *this* action could defeat the tax title holder, and that is not the intention or purport of the statutes in question."

The implications in Pender v. Alix, 11 U2 58, 354 P2 1066, support the foregoing reasoning.

Brown acquired a tax deed from Salt Lake County in Sept., 1942. Pender brought a quiet title suit in 1947 and joined Salt Lake County as defendant but not Brown. Brown learned of the action and joined in 1959 as intervenor, asserting his tax title and continuous occupancy and payment of taxes since 1942. The court granted Brown's motion for summary judgment, and Pender appealed. In affirming the summary judgment, our Supreme Court said Pender asserted neither

payment of taxes or occupancy during or after the four years ensuing after Brown obtained the tax deed.

If there could be an implication that the court might have ruled otherwise if Pender had proved occupancy "after the four years ensuing after Brown obtained the tax deed", such implication is squarely against the language in the Peterson vs. Callister case, which the Supreme Court expressly cited and reaffirmed in the Pender case.

## CONCLUSION

In conclusion, we repeat that this case has been resolved in favor of respondents by the dictum in Peterson v. Callister, which analyzed the statutes of limitation aforesaid as they applied to a hypothetical case which is on all fours with the instant case. Here, 26 years after the initiation of the tax title, appellants acquired a portion of the outstanding legal title, where the legal owners had admittedly abandoned the property even before the initiation of the tax title, and appellants then by a brief, cursory and unsuccessful effort attempted to put themselves into "actual occupancy and possession" to oust the tax title claimants. This is inimical to the intent and purpose of our limitations statutes and such efforts should, as in the past, fail.

Respectfully submitted,

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